No. 10,749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

L. S. CASE, doing business as L. S. Case Company, and TRAVELERS INSURANCE COMPANY (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and DAVID M. YOUNG,

Appellees.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE PILLSBURY, DEPUTY COMMISSIONER.

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STATEMENT OF CASE.

On October 1, 1941, David M. Young, hereinafter designated as "claimant", was in the employ of L. S. Case Company as a carpenter on board the S.S. "West Portal" at Oakland, California, and while thus engaged a foreign body entered his right eye, causing an ulcer resulting in industrial blindness of the eye.

The employer and insurance carrier paid claimant compensation for temporary total disability and for the loss of vision of the eye and there is no question here regarding this phase of the matter. The deputy commissioner, however, found that claimant sustained a serious facial and head disfigurement in addition to the loss of sight. The deputy commissioner found the facts with respect to said disfigurement as follows:

> "That by reason of said injury claimant has sustained, in addition to said loss of sight, serious facial and head disfigurement consisting in a large white spot across the pupil of said eye resembling a cataract and some narrowing of the aperture between the upper and lower eyelids of said eye. That just and equitable compensation therefor is $750.00, which is payable forthwith;"

It is the award based thereon which appellants attack as being not in accordance with law. It is the appellants' contention (the only issue in the case) that the award for the loss of vision of the eye precluded an additional award for the disfigurement resulting from a large white spot across the pupil and a narrowing of the aperture between the upper and lower eyelids.

ARGUMENT.

POINT I.

WHERE THE INJURY CONSISTS OF DISFIGUREMENT AS WELL AS DISABILITY AN AWARD FOR BOTH IS PROPER.

Before proceeding to the argument of this point, the Court's attention is called to the fact that appellants did not, in the libel, challenge the finding of fact of the deputy commissioner to the effect that claimant sustained a serious facial and head disfigurement upon the ground that said finding was not supported by evidence; therefore the finding is not subject to judicial review but should be regarded as final and conclusive. Compare *South Chicago Coal & Dock Co., et al. v. Bassett, deputy Commissioner,* 309 U.S. 251 (1940); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162 (1933); *Crowell, deputy commissioner, v. Benson,* 285 U.S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deupty commissioner,* 286 U.S. 528 (1932), 71 C. J. 1297, sec. 1268; *Parker, deputy commissioner, v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Marshall, deputy commissioner, v. Pletz,* 317 U.S. 383 (1943).

Appellants' contention that claimant is not entitled to an award for the disfigurement admittedly existing, because he received an award for loss of vision of the right eye, is not supported either by a proper construction of the Act nor by the weight of authority.

CONSTRUCTION OF THE ACT.

Section 8(c) of the Longshoremen's Act (33 U.S.C.A. sec 908(c)) specifies the number of weeks' compensation to be paid for the specified losses (and losses of use) enumerated in the subdivisions 1 to 19 of said section, such as for the loss of an arm, leg, hand, etc. Subdivision 22 of that section provides in substance that if more than one member or parts of more than one member are lost, there shall be an award for each such member or part thereof which is lost. In addition to said subdivisions 1 to 19, relating to compensation for the loss (or loss of use) of a member or members, subdivision 20 of said section makes an additional provision for disfigurement as follows:

> "Disfigurement: The deputy commissioner shall award proper and equitable compensation for serious facial or head disfigurement, not to exceed $3,500."

There is no provision in the Act limiting an award for disfigurement to those cases wherein no award is made for the loss of a member. It seems plain that subdivisions 1 to 19 provide for awards for the impairments resulting from loss of members while subdivision 20 provides separately for an award for *disfigurement*. The award for the loss of a specified member, or members, may bear some general relation (although it does not have to) to a decrease in an employee's wage earning capacity; and similarly the award for disfigurement is not necessarily to be related to a specific loss of earning capacity, although in cases it may be by chance correlation. As the United

States Supreme Court stated in *American Knife Co. v. Sweeting,* 250 U.S. 596:

> "But we cannot concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based. Unquestionably it is a rational basis, and it is adopted for the generality of cases by the New York law. But the Court of Appeals has construed the 1916 amendment as permitting an allowance for facial or head disfigurement although it does not impair the claimant's earning capacity. *Matter of Erickson v. Preuss,* 223 N.Y. 365, 368; and see opinion of Judge Cardozo in the present case, 226 N.Y. 199, 200. * * *"
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> * * * * * * *
>
> "* * * And we see no constitutional reason why a State may not, in ascertaining the amount of such compensation in particular cases, take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not."
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> * * * * * * *
>
> "Whether an award for such disfigurement should be made in combination with or independent of the compensation allowed for the mere inability to work is a matter of detail for the State to determine."

If an employee should sustain an injury resulting only in the loss of hearing of one ear, should he receive under the Longshoremen's Act the same compensation as another employee who sustained an injury resulting not only in loss of hearing of one ear but the disfiguring loss of the ear itself? Similarly,

should an employee who sustains an injury resulting in a loss of vision of one eye receive the same compensation as another employee who not only sustains similar loss of vision, but in addition a disfigurement due to a white scar across the pupil of the eye and a narrowing of the aperture between the upper and lower eyelids? The common sense answer should immediately be, "No". Congress apparently intended that disfigurement awards shall be made where disfigurement exists, even though concurrently there may be impairment of the function of the affected organ or facial member.

WEIGHT OF AUTHORITY.

The weight of authority regards compensation for disfigurement as a basis for an award separate from that which is made for the loss or loss of use of the member itself or the function of the facial member, where the appearance of the member is such as to cause disfigurement. In *Tinsley v. Walgreen Drug Company,* 197 S.C. 415, 15 S.E. (2d) 667 (1942), the Court held that compensation for disfigurement of the hand, in addition to compensation for its loss of use, was proper. (N.B. Disfigurement compensation under the Longshoremen's Act does not extend to body members, but to facial and head areas.) *Murdaugh v. Robert Lee Construction Co.,* 185 S.C. 497, 194 S.E. 447 (1938), involved the same principle. *Coates v. Warren Hotel,* 18 N.J. Misc. 363, 13 Atl. (2d) 787 (1940), held that an allowance for disfigure-

ment is *in addition to* the strictly functional loss ensuing from injury and is within both the spirit and letter of the law. *Renick v. Missouri-Pacific R.R. Co.,* 95 S.W. (2d) 872 (1936) (not reported in State reports), held that compensation may be paid for disfigurement in addition to compensation for loss of the eye. *Indiana Limestone Co. v. Stockton,* 88 Ind. App. 22, 163 N.E. 27 (1928), held the same. Compare *Elkins v. Lallier,* 38 N.M. 316, 32 Pac. (2d) 759 (1934).

NEW YORK AUTHORITIES.

The decisions of the New York Courts construing the New York workmen's compensation law are of greater importance as precedents than the decisions of other jurisdictions. The Longshoremen's Act was modelled after the New York workmen's compensation law; *Marshall, deputy commissioner, v. Mahoney,* 56 F. (2d) 74 (C.C.A. 9, 1932; *Luckenbach S. S. Co. v. Marshall, deputy commissioner,* 49 F. (2d) 625 (D.C. Ore. 1931); *Bethlehem Shipbuilding Corp. v. Monahan, deputy commissioner,* 54 F. (2d) 349 (C.C.A. 1, 1931); *Webster v. Clodfelter,* 130 F. (2d) 434 (App. D.C. 1942); *Hartford Accident and Indemnity Co. v. Hoage, deputy commissioner,* 85 F. (2d) 411 (App. D.C. 1936); *Employers Liability Assurance Corporation v. Monahan, deputy commissioner,* 91 F. (2d) 130 (C.C.A. 1, 1937). See also House Report No. 1190, 69th Congress, First Session, at page 2. It is a generally recognized rule of statutory construction that the adoption of a statute of

another jurisdiction carries with it the construction which has been placed upon it prior to its adoption. *Capital Traction Co. v. Hof,* 174 U.S. 1; *Metropolitan Ry. Co. v. Moore,* 121 U.S. 558; *Bethlehem Shipbuilding Corp. v. Monahan, deputy commissioner,* 54 F. (2d) 349 (C.C.A. 1, 1931); *West Penn Sand and Gravel Co. v. Norton, deputy commissioner,* 95 F. (2d) 498 (C.C.A. 3, 1938); *Newton v. Employers Liability Assurance Corp.,* 107 F. (2d) 164 (C.C.A. 4, 1939).

The following New York cases taken from Special Bulletin No. 161, issued by the Department of Labor, New York State, have interpreted the corresponding provision of the New York law regarding the payment of compensation for disfigurement. The quotation is from page 127 of the Bulletin and is as follows:

> "The Appellate Division, unanimously and without opinion, affirmed award for disfigurement in the following * * * cases: $450 to a chauffeur for staring appearance and retraction of a glass eye; *Ackerman v. New East 97th St. Garage,* 224 App. Div. 681; $250 to a painter for a tic or habit spasm of his left eye as a consequence of a plaster burn on its cornea: *Berchenke v. Miller,* 223 App. Div. 803; $500 to a carpenter for immobility and other defects of a glass eye substituted for a blind eye that has to be enucleated because of accident: *Gibbs v. Czapela,* 224 App. Div. 799; and $1,500 to a garage worker for the appearance of his right eye's socket following destruction of the eye by sulphuric acid and insertion of a glass eye in its place: *Partridge v. Tew Motor Sales Co.,* 222 App. Div. 787."

Also in the case of *Lipton v. Victor X-Ray Corp.*, 36 State Dept. (N.Y.) 697, an award of $500 for serious permanent disfigurement was made to a traveling salesman to whom an award of a lump sum had previously been awarded and paid for the entire loss of vision of his right eye.

Construing the provision of the New York law which was adopted in the Longshoremen's Act, the United States Supreme Court said in the combined cases of *New York Central R. R. Co. v. Bianc; American Knife Co. v. Sweeting; Clark Knitting Company, Inc., et al. v. Vaughn,* 250 U.S. 596 (1919) that:

> "In each case an award was made on account of such disfigurement *irrespective of the allowance of compensation according to the schedule based upon the average wage of the injured employee and the character and duration of the disability.*" (Italics supplied.)

In other words, the award for disfigurement was made *in addition to the award for permanent partial disability* due to functional impairment. The United States Supreme Court held in these cases that this was proper.

APPELLANTS' AUTHORITIES.

The authorities cited by appellants in support of their contention that an award for disfigurement may not be made in addition to an award for the loss of use of the member itself either are not in point, do

not state the holding of the highest Court of their respective jurisdictions, or are based upon specific statutory provisions respecting awards for disfigurement. The two New York cases cited by appellants, namely, *Freeman* (should be Freeland) *v. Endicott Forging & Manufacturing Co.,* 253 N.Y.S. 597, and *Beekman v. New York Evening Journal,* 15 N.Y.S. (2d) 671, are not in point in that the former holds that an award for disfigurement may not be made concurrently with an award for loss of earning capacity (non-scheduled injury), and the latter case holds that an award for disfigurement may not be made in addition to an award for permanent total disability (also non-scheduled). In the instant case there was neither an award for loss of earning capacity nor for permanent total disability, but an award of indemnity for a specific scheduled loss as provided by section 8 (c).

The other cases cited by appellants, namely, *Brown v. State Workmen's Insurance Fund,* 131 Pa. Sup. 174, 200 Atl. 174; *Madajewski v. Susquehanna Collieries Co.,* 135 Pa. Sup. 181, 4 Atl. (2d) 809; and *Phillips v. Coxe Bros. & Co.,* 135 Pa. Supp. 185, 5 Atl. (2d) 445, are all decisions of the Pennsylvania Superior Court, which is not the highest Court of Pennsylvania. The Pennsylvania Supreme Court, which is the Court of last resort, has stated its opinion with reference to the point at issue in the case of *Sustar v. Penn Smokeless Coal Co.,* 285 Pa. 395, 132 Atl. 345 (1926), which involved the question whether compensation for disfigurement could be awarded in

addition to compensation for loss of the eye. The Court in its memorandum opinion adopted the opinion of the Court below reported in 85 Pa. Sup. 531 and stated:

> "The Superior Court * * * properly decided that compensation payable under the Act of 1921 is not exclusive of all other compensation but may be awarded for disfigurement in addition to that given for loss of a body member * * *."

Two cases cited by appellants, namely, *Milling Machinery Co. v. Thomas,* 174 Okla. 483, 50 Pac. (2d) 395 (1935); and *Hansen v. Dakota Transportation Co.,* 65 S. Dak. 277, 273 N.W. 261 (1937), appear to require special comment. It is believed that the Court should be apprised that both of these decisions are the result of specific provisions in the respective laws to the effect that compensation for disfigurement shall not be in addition to compensation for so-called scheduled losses (losses of members). In Oklahoma the law provides:

> "Provided, that compensation for * * * disfigurement shall not be in addition to the other compensation provided for in this section * * *."

In South Dakota, the law provides:

> "No compensation shall be payable under this subdivision (for disfigurement) where compensation is payable under subdivisions (3), (4), and (5) of this section. (Matter in parentheses ours.)

These two cases not only do not support appellants' contention but rather appear to lend support to the view that a special provision in the law is necessary

if an injured employee is *not* to receive compensation for disfigurement because he has received compensation for a member loss. There is no such provision in the Longshoremen's Act.

Appellants have also cited *Travelers Insurance Co.* v. *Norton, deputy commissioner,* 30 F. Supp. 119. Why it was cited is not apparent, as the fact situation therein has not the remotest resemblance to that in the instant case. It did not involve construction of subdivision 20 of section 8 (c) (as does the instant case) but rather two other subdivisions, namely, 15 and 18 of section 8 (c), relating to an award for loss of use of the leg.

CONCLUSION.

It has been repeatedly stated that the Longshoremen's Act is a remedial statute and should be liberally construed in favor of the injured workman and his family. *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner,* 284 U.S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris,* 61 App. D.C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al., v. Cardillo, deputy commissioner,* 70 App. D.C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & Ohio R. R. Co.,* 71 F. (2d) 810 (C.C.A. 4, 1934), certiorari denied October 8, 1934, 293 U.S. 581. When Congress has provided that an employee should receive compensation for facial disfigurement it would not be a liberal construction of the Act to read into it a condition or

qualification not plainly discernible which would deprive the employee of part of his compensation. For the above reasons, it is believed that the modest award for facial disfigurement which was made in this case was proper and that the judgment of the United States District Court dismissing the libel, and thus, in effect, affirming the award, should be affirmed.

Dated, San Francisco, California,
August 2, 1944.

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